D.T.E. 99-76

Petition of Boston Gas Company, Colonial Gas Company and Essex Gas Company, pursuant to G.L. c. 164, §§ 76 and 94A, for Approval by the Department of Telecommunications and Energy of a Gas Resource Portfolio Management Contract

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I. INTRODUCTION

On July 30, 1999, Boston Gas Company, Colonial Gas Company, and Essex Gas Company (collectively "Companies") submitted to the Department of Telecommunications and Energy ("Department"), for informational purposes, a copy of the Request for Proposals ("RFP") that the Companies had issued on July 15, 1999.[1] As indicated in the RFP, the Companies solicited bids from potential portfolio managers for two services: (1) managing certain upstream interstate gas supply, transportation, and underground storage assets; and (2) providing city-gate[2] gas supply requirements of the Companies' sales customers. The Companies requested bids on these services for a three-year period from November 1, 1999 to October 31, 2002. The Department in NOI - Natural Gas Unbundling, D.T.E. 98-32-B at 54-55 (1999) recognized that the portfolio auction had the potential to provide economic and other benefits for the LDCs' customers.

The July 30 filing asserted that in order to estimate the portfolio's value, potential bidders had to make a range of assumptions about the future market value of the Companies' resources (Letter from Robert J. Keegan, Attorney for the Companies, to George Yiankos, Gas Division Director, July 30, 1999 at 1-2). Accordingly, the Companies believed that the time between the bid and the effective date of the contract would affect the value of the bids submitted by potential portfolio managers (id. at 2). A regulatory review period longer than 30 days could significantly diminish the value received for the portfolio (id.). Thus, the Companies indicated that they intended to file the portfolio management contract for the Department's approval on September 15, 1999, and to seek Department approval by October 15, 1999 for a contract effective November 1, 1999 (id.).[3]

On August 27, 1999, the Department opened a proceeding, pursuant to G.L. c. 164, §§ 76 and 94A, to receive comments on the RFP and the contract. On September 15, 1999, the Companies filed a Request for Approval ("Request") of a Gas Resource Portfolio Management and Gas Sales Agreement ("Agreement") with El Paso Energy Marketing Company ("El Paso").[(4)] Comments were submitted by AllEnergy Marketing Company, L.L.C. ("AllEnergy") and the Attorney General of the Commonwealth ("Attorney General").[(5)] The Companies filed Reply Comments on October 1, 1999. In addition, the record of this proceeding includes the Companies' responses to the Department's 40 information requests and the Attorney General's 23 information requests, and El Paso's responses to the Department's seven information requests.[(6)]

II. COMPANIES' RFP AND AGREEMENT

A. Description of Bid Process Leading to Proposed Agreement

According to the Companies, an asset management contract should (1) provide reliable, least-cost supply and transportation service to the Companies' customers, (2) optimize the competitive value of the Companies' supply, transportation, and underground-storage assets, and (3) optimize the Companies' combined resource portfolios to reduce the unit cost for sales customers (Request Att. 2, at 3).

Boston Gas, Colonial Gas, and Essex Gas judged that a single asset manager should be responsible for all three companies' portfolios (id.). The Companies state that this decision was based on their prior experience and discussions with potential portfolio managers (id.). The Companies assert that a single asset manager for their combined portfolios will produce higher management fees than would the three portfolios separately, because of the asset manager's scale economies and operational flexibility (id.).

The Companies chose a three-year contract period to reduce the business- and weather-related risks the asset manager would face(id.). Lower risk would increase the bid value (id.). The Companies also note that the three-year period is consistent with the Department's directives (id. Att. 2, at 3-4, citing D.T.E. 98-32-B at 55).

The Companies addressed the compensation due under any asset management arrangement (id. Att. 2, at 4). First, the compensation by the Companies to the asset manager was structured to reflect a pricing hierarchy that "mimics" the resource usage that the Companies currently experience (id.).[(7)] This pricing hierarchy was adopted to assure that the commodity costs could be compared and the bid reviews would be facilitated (id.). Second, the asset manager's payments to the Companies (for the right to manage the portfolio) were designed to be paid in 36 equal monthly installments in order to facilitate a comparison among the received bids (id.).

Downstream resources were excluded from the out-sourced asset management portfolio because, unlike the upstream resource, the Companies lacked multi-year experience in working with a manager of downstream assets (id.). The Companies state that prior upstream experience allowed them to structure their relationship with the asset manager and enabled them to design an RFP that would maximize the portfolio's value (id. Att. 2, at 4-5). In addition, the Companies assert that the basic premise for such contracts is the asset manager's right to use the portfolio for its best interests provided the LDC's city-gate needs are met (id. Att. 2, at 5).

In addition, the Companies excluded certain upstream resources from the RFP. Specifically, the excluded resources are Boston Gas Company's entitlement to 43,200 MMBtu/day of upstream capacity on the Maritimes and Northeast Pipeline, L.L.C. because the commencement date of that contract is not known; and Colonial Gas Company's contracts regarding (1) CNG Transmission GSS Storage Service, (2) the associated downstream transportation services on the Texas Eastern Pipeline, and (3) the corresponding downstream transportation services on the Algonquin Gas Transmission Company pipeline because Colonial had previously entered into an arrangement with a party other than El Paso for the management of these resources (Exh. DTE-2-16).

On August 12, the Companies received 14 portfolio-management proposals (id. Att. 2, at 6). The Companies assessed these bids principally on the following elements: (1) the management fee; (2) key operating assumptions; (3) willingness to adhere to the Companies' proposed contract terms; and (4) the bidder's prior asset management experience (id. Att. 2, at 4-6). Some bidders also submitted alternative bids in addition to the required conforming bid (id. Att. 2, at 7). The six alternative bids were also assessed and ranked (id. Att. 2, at 9). From August 23 through August 24, the Companies sought additional information and clarifications on key operating assumptions from several bidders (id. Att. 2, at 9). On August 27, the Companies selected three finalists, i.e., their short list of candidates for the Asset manager contract, based upon the capacity management fee and consistency with the Companies' non-price criteria (id. Att. 2, at 6-7, 9). El Paso was selected on September 3, 1999, because the Companies believed that its bid provided the maximum value for the portfolio without compromising service quality (id. Att. 2, at 7, 9).

B. Description of Proposed Agreement

The proposed three-year Agreement with El Paso will run from November 1, 1999 through October 31, 2002 (id. Att. A, at § 5.1). The Companies contend that ratepayer benefits will accrue from the fee that El Paso will pay for the right to manage the Companies' portfolio (id. Att. 2, at 10). The Companies state that ratepayer obligations for demand charges and commodity rates are unaffected, because the commodity "pricing hierarchy reflects the manner in which the Companies have traditionally utilized their gas supply resources to meet system requirements" (id.).[(8)] Thus, the Companies contend that the commodity prices experienced by customers during the term of the Agreement will be dictated by the same indices that would have determined prices in the absence of the Agreement (id. Att. 2, at 10-11). El Paso is not required to use the Companies' resources to serve the Companies, and the Companies will receive no benefits from El Paso's use of those resources to serve other parties (id. Att. 2, at 11). The Companies will continue to administer the mandatory assignment of capacity as its sales customers migrate to transportation service (id.). Consequently, El Paso's assigned capacity will be subject to monthly adjustments (id.). El Paso will have full operational control of the assigned resources, but it will not receive any authority either to change the Companies' long term commitments for those resources or to change the primary receipt and delivery points for the assigned capacity (id. Att. 2, at 11-12). The Agreement also requires El Paso to reimburse the Companies for any increased costs, plus an administrative fee, should the Companies be required to secure substitute supplies if El Paso has an "unexcused" inability to deliver the requisite gas (id. Att. 2, at 12). In addition, El Paso will have to pay additional liquidated damages if the Companies are unable to secure the necessary replacement gas (id. Att. 2, at 12). Finally, El Paso Energy Company, El Paso's parent, has provided a guaranty of El Paso's payment obligations (id.; Request Att. A at app. 2).[(9)]

The Companies indicate that El Paso's management fee will be apportioned among the three companies according to their relative demand charges associated with the assigned portfolio (id. Att. 2, at 13).[(10)] The Companies propose to flow the Agreement's associated costs (demand charges and commodity costs) and revenues through the CGA and treat the portfolio management revenues (from El Paso) consistent with the treatment authorized in Interruptible Transportation, D.P.U. 93-141-A (1996) (id. Att. 2, at 16).

III. POSITIONS OF THE COMMENTERS

A. AllEnergy

AllEnergy urges the Department either to deny approval of the Agreement or to limit its duration to no more than six months for two reasons: (1) the Companies' RFP process failed to comply with the requirements set forth in D.T.E. 98-32-B; and (2) enforceable standards of conduct to address market power[(11)] concerns remain undeveloped and such standards must precede any long-term portfolio management arrangement (AllEnergy Comments at 2, 4). AllEnergy cites to D.T.E. 98-32-B at 56 as support for its claim that standards of conduct should be developed and approved prior to an LDC's issuance of an RFP soliciting portfolio management services. Accordingly, AllEnergy argues that since such standards have yet to be developed and approved, and since Collaborative participants and the Department have been effectively precluded from making structural changes to the RFP to alleviate market power concerns before its issuance, the Companies' RFP process fails to comport with the intent of D.T.E. 98-32-B and, therefore, that the Companies' Request should be denied (id. at 2).

AllEnergy further argues that the structure of the RFP and the resulting Agreement will concentrate over 50 percent of the upstream capacity currently held by Massachusetts LDCs in the hands of a single entity that, unlike the LDCs, is not subject to the Department's jurisdiction (id. at 3-4). Moreover, AllEnergy notes that when the Department performs its third-year assessment of market conditions, that it will likely find fewer contract holders of capacity due to this and additional portfolio outsourcing arrangements, and that therefore, these developments may extend the period before the wholesale market is deemed to be workably competitive (id.). Accordingly, AllEnergy recommends that the Department limit the term of the Agreement to no more than six months so that the identified issues may be aired and resolved (id.).

On October 12, 1999, AllEnergy responded to the Companies' Reply Comments. AllEnergy renews its argument that the Companies did not comply with D.T.E. 98-32-B because, contrary to the Department's suggestion, standards relevant to market power have yet to be developed by the Collaborative (AllEnergy Response at 1). According to AllEnergy, "the [Companies] should have recognized that the Department's suggestion placed an obligation on them to make sure that this issue was brought to the Collaborative and addressed" (id.).

AllEnergy also argues that the Companies have misunderstood its concerns regarding market power (id. at 2). AllEnergy states that its concerns lie with the portfolio manager's ability to exert market power in the wholesale market, and not with issues of retail affiliate abuse or retail market power as stated by the Companies (id.). According to AllEnergy, wholesale market power impacts the retail market by forcing wholesale prices to be greater than what they would be under a competitive wholesale market scenario (id.). In AllEnergy's view, an unregulated wholesale marketer is not obligated to release capacity and may bundle that capacity with gas commodity as the only alternative into a market (id.). AllEnergy contends that this is an unregulated form of cost-shifting to retail customers from the "new unregulated portfolio manager monopolist" (id.). In addition, without the discipline of multiple sellers, a single wholesale marketer with a significant hold on capacity in a region can squeeze monopoly profits from retail suppliers, possibly forcing them from the market (id. at 2-3). While AllEnergy accepts the Companies' correction to its prior calculation of the companies' upstream capacity, AllEnergy notes that if the statewide total is adjusted for the same error, the Companies still hold 50 percent of the market (id. at 2 n.2).

Furthermore AllEnergy argues that the Companies are not in a position to determine that the prices that the portfolio manager is offering to the retail market buyers are competitive, and that it is not reassuring for the Companies to state that they know market power when they see it (id.). Moreover, AllEnergy argues that neither the Department nor the FERC is in a position to make such a determination vis-a-vis an unregulated wholesale marketer (id.). Thus, AllEnergy contends that protections must be put in place up front, especially with a market that the Department has found to be not yet workably competitive (id.).

B. Attorney General

In "preliminary comments"[(12)] the Attorney General identifies four issues associated with the Companies' Request. The Attorney General contends that the Department should resolve these issues only after a thorough investigation, including evidentiary hearings. These issues are: (1) whether the portfolio management proposal chosen by the Companies provided the best price and non-price terms; (2) whether the proposed management contract, as a "replacement resource" provides net benefits to existing firm ratepayers relative to the existing resource; (3) whether approval of the portfolio management contract will result in inappropriate market power in light of the fact that El Paso's affiliate, Tennessee Gas Pipeline Company is the largest of the two pipelines that serve Massachusetts; and (4) whether the Companies' proposal to retain a portion of the results of the portfolio restructuring is consistent with the "margin sharing" principles adopted in Interruptible Transportation, D.P.U. 93-141-A (1996) (Attorney General Preliminary Comments at 2).

C. Companies

The Companies submitted an Explanatory Statement along with their Request. In their statement the Companies argue that the recent mergers of Colonial Gas and Essex Gas with Eastern Enterprises[(13)] have created a unique opportunity to capture increased value from economies of scale and operational flexibilities arising out of the coordination of their gas supply resources (Request Att. 2, at 2). In an attempt to extract maximum value from their combined portfolio to benefit their ratepayers, the Companies state that they designed and conducted a "fair, open and transparent" RFP process (id. citing D.T.E. 98-32-B at 55). The Companies argue that their RFP process should be deemed "fair, open and transparent" because the RFP was issued to 26 of the largest potential portfolio managers as ranked by sales, the Companies conducted a pre-bid conference, and the Companies responded in writing to both pre-conference questions and post-conference questions (id.).

The Companies argue that the Agreement represents the least-cost alternative for the customers of each company (id. Att. 2, at 13). The Companies note that because commodity prices under the Agreement are consistent with those experienced in the absence of the Agreement, the benefits for customers are reflected in the capacity-management fee (id.). The Companies state that the fee far exceeds the aggregate, historical level of revenues that the Companies had previously earned from their mitigation activities (id.). The Companies state that the recent restructuring of the Companies' combined gas resources has eliminated mitigation opportunities that the Companies' would have possessed without restructuring (id.) Thus, they contend that the Agreement's benefits are even greater than what would be indicated by comparison with historical mitigation activities (id. Att. 2, at 13-16).

The Companies argue that the proposed Agreement is consistent with the Department's public interest standard of review applicable to the review of long-term supply contracts filed pursuant to G.L. c. 164, § 94A. First, the Companies state that the proposed Agreement is consistent with their resource-portfolio objectives because the arrangement will allow the Companies to provide customers with least-cost and reliable gas service (id. Att. 2, at 17). Second, the Companies argue that they implemented a fair, open and transparent competitive bidding process through which the Companies determined that the proposed Agreement compares favorably to "reasonably available" market options in that the Agreement will provide customers with the greatest economic benefits while maintaining the needed level of reliability (id.).

The Companies submitted Reply Comments responding to the concerns raised by AllEnergy and the Attorney General. Echoing their initial arguments made in the Explanatory Statement, the Companies state that the Agreement will provide significant cost savings to customers consistent with the Companies' continuing obligation to provide customers with least-cost reliable service (Companies' Reply Comments at 1). In addition, the Companies argue that the outsourcing of the resource portfolio will foster greater liquidity in the upstream capacity market by transferring to the wholesale market the management of capacity resources currently under contract to the Companies (id.).

According to the Companies, there is no need for an evidentiary hearing for the Department to resolve the questions raised by the Attorney General (id. at 3). First, as a legal matter, the Companies assert that G.L. c. 164, § 94A does not require a hearing (id.). Second, as a practical matter, the Companies argue that they have provided "overwhelming, unchallenged evidence supporting approval" (id.). Finally, the Companies aver that the scheduling of hearings in this matter would be tantamount to a denial because the Agreement is null and void of its own terms if not approved on or before October 15, 1999, and that it would be impossible to complete hearings prior to that date (id. at 3, n.4 citing Request Att. A, at § 10.1).

The Companies specifically respond to AllEnergy's and the Attorney General's concerns as to whether the proposed Agreement and the RFP process the Companies conducted are consistent with the Department's standard of review for § 94A contracts and the Department's directives in D.T.E. 98-32-B. The Companies contend that in D.T.E. 98-32-B, the Department determined that until a workably competitive upstream-capacity market develops the LDCs will continue to have the obligation to provide customers with safe, reliable and least-cost service (id. at 4). As part of their efforts to provide reliable, least-cost service, the Companies state that they undertook steps to procure the service of an asset manager for their upstream capacity contracts -- a concept endorsed by the Department in D.T.E. 98-32-B at 34 (id.). In addition, the Companies point out that the ongoing gas unbundling backdrop played an important role in the Companies' evaluation of gas-supply synergies that would result from their respective mergers (id.). Finally, the Companies contend that they recognized the value of the combined portfolio to a wholesale marketer during their previous experience with limited-term asset-management arrangements (id.).

Thus, consistent with their obligation to continue to provide reliable, least-cost service the Companies issued the RFP. According to the Companies, the Department should approve the resulting Agreement because it is the product of an "fair, open and transparent" competitive bidding process that provides the highest possible value to customers, and because the Agreement will provide net benefits to existing firm customers (id. at 6). The Companies reiterate that these benefits are even more significant because the Companies' existing portfolio has changed since the last heating season, and these changes tend to reduce future mitigation opportunities associated with the portfolio (id. at 7).

The Companies dispute AllEnergy's contention that the Companies' RFP process failed to comply with the requirements of D.T.E. 98-32-B. While the Department "suggest[ed]" that the Collaborative develop standards for wholesale and retail marketers participation in the market area in connection with the portfolio auction, the Companies argue that the Department did not, in fact, require that such standards be developed, nor did the Department indicate that such standards had to be developed by the Collaborative before an individual LDC could pursue an outsourcing arrangement (id. at 8). The Companies contend, moreover, that the Department expressly stated that an LDC that pursues an auction should "hedge against the potential for abuse by evaluating the portfolio manager's conduct during the term of the LDC's portfolio management contract" (id. at 8 citing D.T.E. 98-32-B at 56-57). According to the Companies, they have considered and resolved issues concerning the effect of the outsourcing arrangement on the development of retail competition through the contracting process, as contemplated by the Department (id. at 8-9). Specifically, the Companies argue that the RFP required bidders to disclose any potential conflicts of interest, and that the Companies were prepared to address this issue during the contract negotiations (id.). This preparedness, however, became unnecessary because the winning bidder -- El Paso -- has no retail affiliate, and will not be involved in the assignment of capacity to retail marketers (id. citing Exh. DTE-1-4, DTE-1-5, DTE-2-6, DTE-2-8, DTE-2-9, DTE-2-10, and DTE-2-15).

In addition, the Companies argue that the proposed Agreement will not pose a barrier to the development of retail competition in Massachusetts because the concern about market power expressed by AllEnergy and the Attorney General is not present in this proposed outsourcing arrangement (id. at 9-13). According to the Companies, the market power concern actually relates to the potential for market abuse stemming from an affiliate relationship such as (1) between a pipeline company and a wholesale marketer, or (2) between the wholesale marketer and a retail marketing affiliate (id.). The Companies argue that standards of conduct established by the FERC apply to the relationship between the Tennessee Gas Pipeline Company and El Paso, and there is no retail marketing entity affiliated with El Paso (id.). Thus, in their opinion, no market power issue is raised by this Agreement.

Further, the Companies dispute AllEnergy's assertion that the proposed Agreement concentrates over 50 percent of Massachusetts capacity in the hands of a single marketer raising "serious market power concerns" (id. at 11). According to the Companies, their individual portfolios have already been consolidated due to their approved mergers, not because of the portfolio management arrangement (id. at 11-12). Thus, in the Companies' view, there will be no fewer, and no more, holders of this capacity as a result of the Agreement (id. at 12). The Companies also challenge AllEnergy's claim of excessive market concentration. According to the Companies, to the extent that AllEnergy is asserting that the portfolio-management arrangement will affect the retail marketers' resource alternatives for supplying customers in Massachusetts, the relevant analysis is not what percentage of capacity El Paso will manage in relation to capacity held by other LDCs, but rather, what the Companies' capacity resources are in relation to the spectrum of transportation alternatives available to retail marketers, or total deliverability into the region (id. at 12). In that regard, the Companies assert that their resource portfolio represents only 14 percent of the total capacity serving this region (id. at 12-13).

Lastly, the Companies address AllEnergy's suggestion that the Department refrain from approving a portfolio-management arrangement until "market power" issues are resolved and until it is determined whether the Department should require "multiple winners" in any portfolio auction. According to the Companies, the Department has already determined in D.T.E. 98-32-B that the Companies must maintain their traditional obligation to serve for the transition period (id. at 13). Thus, in their opinion, the portfolio-management arrangement does not represent a fundamental change in the structure of the Companies' gas sales service, but is merely a mechanism to enhance the level of mitigation revenues achieved by the Companies for the use of its gas-supply resources (id.). Accordingly, the Companies urge approval of the Agreement because its three-year term is consistent with the Department's transition period, and approval of the Agreement neither creates a new market structure nor precludes the development of retail competition (id.).

IV. DISCUSSION

A. Standard of Review

In this case we have been asked by the Companies to approve of their execution of a three-year Gas Resource Portfolio Management and Gas Sales Agreement with El Paso. Because the Companies will be procuring their gas supply from El Paso pursuant to the terms of this Agreement and because the Companies' customers will be responsible for gas costs as passed-through the Companies' CGAC, we assess the merits of the Companies' Request in accordance with the requirements of G.L. c. 164, § 94A.[(14)] Furthermore, we acknowledge that the Companies are not seeking our approval for new or different gas commodity or capacity contracts. Rather, the Companies are seeking our approval for their outsourcing of previously-approved contracts and are assigning the management responsibility of those contracts to El Paso. Under these circumstances, we find that G.L. c. 164, § 76 also applies. Thus, we will also evaluate the Agreement under our general supervisory powers. In addition, because this Agreement is the result of an RFP process sanctioned and encouraged by the Department in NOI - Gas Unbundling, D.T.E. 98-32-B, we review the Companies' chosen RFP process for consistency with the requirements of that Order.

In evaluating a gas utility's resource options for the acquisition of commodity resources as well as for the acquisition of capacity under G.L. c. 164, § 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. Commonwealth Gas Company, D.P.U. 94-174-A at 27 (1996). In order to demonstrate that the proposed acquisition of a resource is consistent with the public interest, a local distribution company ("LDC") must show that, at the time of the acquisition or contract renegotiation, the acquisition (1) is consistent with the company's portfolio objectives, and (2) compares favorably to the range of alternatives reasonably available to the company and its customers, including releasing capacity to customers migrating to transportation. Id. In addition, with particular respect to requests for proposals for portfolio management services, the Department has required that such process be "fair, open and transparent." NOI - Gas Unbundling, D.T.E. 98-32-B at 54 (1999).

In establishing that a resource is consistent with the company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved resource plan or in a recent review of supply contracts under G.L. c. 164, § 94A, or may describe its objectives in the filing accompanying the proposed resource. Id. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. Id. at 28. As part of the review of relevant price and non-price attributes, the Department considers whether the pricing terms are competitive with those for the broad range of capacity, storage and commodity options that were available to the LDC at the time of the acquisition, as well as with those opportunities that were available to other LDCs in the region. Id. In addition, the Department determines whether the acquisition satisfies the LDC's non-price objectives including, but not limited to, flexibility of nominations and reliability and diversity of supplies. Id. at 29.

B. Analysis and Findings

1. Benefits to Ratepayers

In D.T.E. 98-32-B at 55 the Department noted that "[t]he Portfolio Auction, if used, should be fair, open, and transparent." Consequently, the Department considers the process by which the Companies conducted the auction that led to the Agreement with El Paso. The record indicates that the process was consistent with the specified standards. Bids were submitted to a broad range of the most likely bidders. Moreover, the Department has received no objections to indicate that a potential bidder was unfairly excluded from either initial consideration as a bidder or that any bid was unfairly evaluated. The bid evaluation process was clearly stated, evaluation criteria provided, opportunity allowed for bidders to receive clarification, and a sample contract provided so that bidders and others might understand the Companies' objectives and actions. The record indicates that the El Paso proposal will produce revenues to the Companies in excess of those offered by the competing proposals.

The Department's review of the Companies' proposal indicates that the Agreement is consistent with the Companies' resource portfolio objectives. Under the proposed Agreement, El Paso will manage certain upstream interstate gas supply, transportation and underground storage contracts of the Companies. Because all of the subject contracts have been previously approved by the Department and are, therefore, consistent with the Companies' resource portfolio objectives, this Agreement, which merely transfers day-to-day managerial responsibility over these contracts to El Paso is, perforce, also consistent with the Companies' resource portfolio objectives.

Furthermore, our review of the Companies' Agreement indicates that it compares favorably to current market offerings considering price and non-price factors, as well as current market conditions facing the Companies at the time of the execution of the Agreement. Gas prices under the Agreement will remain consistent with those experienced in the absence of the Agreement. Therefore, the benefits to customers are in the form of the management fee paid to the Companies. Under the proposed arrangement, the management fee will replace the mitigation revenues traditionally earned by the Companies in managing their portfolios. Therefore, to constitute a net benefit to consumers, the fee must equal or exceed the level of mitigation revenues that would otherwise occur. The Companies have been engaging in a variety of mitigation activities using their upstream capacity and commodity rights. These activities are interruptible transportation ("IT"), interruptible sales ("IS"), capacity release ("CR"), and sales for resale. However, because the Companies have recently consolidated their supply portfolios and restructured various contracts, the overall amount of the portfolio capacity has been reduced and, as a result, capacity mitigation revenues are expected to decline. The record indicates that the management fee the Companies will receive from El Paso exceeds the capacity mitigation revenues that would be achieved by the Companies, and therefore produces net benefits to customers.

2. <u>Rate Treatment of Costs and Revenues</u>

As stated in Section II.B., above, the LDCs have proposed to treat the costs and revenues associated with the Agreement, consistent with the treatment authorized in <u>Interruptible Transportation/Capacity Release</u>, D.P.U. 93-141-A. Specifically, in their response to information request DTE-2-7 at 2, provided on October 12, 1999, the Companies propose to treat the mitigation revenues received from El Paso in accordance with the margin-sharing rules established in D.P.U. 93-141-A. Thus, the Companies state that they will allocate the monthly fee among Boston Gas, Colonial Gas, and Essex Gas (separately "Company") in accordance with a formula, and to the extent that this fee causes a Company's mitigation level to exceed its existing threshold, that Company will retain 25 percent of the amount in excess of the threshold (Exh. DTE-2-7 at 2).

In D.P.U. 93-141-A at 60, the Department found that the presence of symmetrical benefits provides sufficient incentives for LDCs to maximize IT and CR margins. Further, in allowing LDCs to retain a portion of the margins generated from CR transactions, the Department sought to provide the LDCs with an incentive to market their excess capacity aggressively. D.P.U. 93-141-A at 61. Consequently, LDCs were allowed to retain 25 percent of the margins earned above a threshold which is adjusted annually to reflect IS, IT and CR transactions for the 12-month period ending April 30 of each year. D.P.U. 93-141-A at 64.

The Department agrees with the Companies argument that they should not be penalized with the loss of capacity-mitigation revenues as a result of pursuing a portfolio management approach that will produce benefits for customers (<u>see</u> Exh. DTE-2-7 at 3). As a result of the Department's directives in D.T.E. 98-32-B, the Companies have undertaken efforts to reduce the costs associated with their respective portfolios. Indeed, the Agreement will result in lower gas costs to customers then there would have been absent the portfolio auction process. Accordingly, we find that the Companies are entitled to the rewards established in D.P.U. 93-141-A because they developed the Agreement which provides more benefits to the Companies' customers than the mitigation efforts undertaken by the Companies in the most recent years.[(15)]

3. Market Power Concerns

In D.T.E. 98-32-B at 54, the Department found the portfolio auction to be a mechanism suited to provide all Massachusetts gas customers with reliable, safe and least-cost service. Further, in approving the concept of the portfolio auction, the Department noted that the auction has the potential to provide customers with efficient administration and use of the LDC's upstream assets. Id. In addition, the Department stated that any portfolio auction must be fair, open and transparent. Id. at 55. However, we also stated that we agreed with the Marketer Group that safeguards may be needed to prevent market power abuses. Id. at 56. Specifically, the Department recognized that portfolio auctions may result in market power and may discourage full retail competition. Id. The Department noted that the participants in the unbundling proceedings recognized that safeguards might be needed and that the market power issue "would need to be addressed in the context of the Portfolio Auction." Id.

The LDCs recognized both the potential for abuse and the need for a full review of these market power concerns during the proceedings in D.T.E. 98-32. The LDCs in that proceeding, stated that:

[I]f we were to move ahead with a portfolio auction, it is something that both the Department needs to look at and commenters need to comment on in order to ensure that those market power concerns are in fact fully identified and fully addressed.

NOI - Natural Gas Unbundling, D.T.E. 98-32 Tr. 4, at 128 (1998).

To address market power concerns, the Department suggested that the Collaborative develop and present appropriate standards for the Department's review. D.T.E. 98-32-B at 56. Although market power issues have been discussed at various meeting of the Collaborative, our suggested course of action remains unfulfilled (see, e.g., Exh. DTE-2-3 (demonstrating that the portfolio auction and related market power issues were topics discussed at MGUC meetings).

The Department directs the LDCs and the Collaborative to develop and submit for Department review appropriate standards of conduct applicable to "wholesale and retail marketers' participation in the market area in connection with the Portfolio Auction." D.T.E. 98-32-B at 56. The LDCs shall submit a progress report on this effort on or before November 30, 1999 indicating whether a settlement of this issue has been, or is likely to be achieved. In the event a settlement cannot be reached, the Department requires the LDCs to submit a proposal for addressing market power issues by December 15, 1999. All interested persons may submit comments on the LDC proposal by December 30, 1999. Based on the comments, the Department will issue standards that will apply to all future portfolio auction proposals.

The Companies note that they have transferred only the "right to manage the resources not needed for assignment to migrating customers for a three-year period consistent with the terms and conditions of the Companies' resource contracts" (Companies' Reply Comments at 12). El Paso will assume the rights that the Companies acquired pursuant to the Department's approval. The Department is concerned that the Companies' transfer of its upstream capacity resources to El Paso has the potential to increase substantially control by an unregulated entity over a significant portion of assets critical to Massachusetts. The Department, therefore, approves this Agreement subject to El Paso's agreeing not to offer the portfolio assets to a competitive affiliate, or to customers of one of its competitive affiliates, without simultaneously posting the offering electronically on a source generally available to the market or otherwise making a sufficient offering to the market. In addition, we retain the right to monitor the activities of El Paso through our jurisdiction over the LDCs. As provided in D.T.E. 98-32-B at 56, the Companies are required to file with the Department annual progress reports describing the Agreement's financial and service effect on the Companies' customers. To ensure that these reports inform the Department on the question of affiliate transactions by El Paso, the Agreement must be amended to provide that El Paso shall inform the Companies quarterly as to the terms of affiliate transactions under the Agreement between El Paso and any competitive affiliate or customers of that affiliate.

V. MOTION FOR PROTECTIVE TREATMENT

A. Introduction

The Companies attached a redacted copy of the Agreement to their Request and submitted a motion seeking protective treatment of the redacted terms (Request Att. 1, Att.A). Specifically, the Companies request that the Department grant protective treatment of the following information: (1) the amount of the management fee (see id. Att. A, at § 3.2, Att. D); (2) the amounts of certain gas costs under the contract such as the price for underground storage refill (id. Att. A, at § 3.4); (3) other administrative fees associated with a failure to deliver and the amount of liquidated damages in such an event (id. Att. A, at §§ 2.4.1, 2.4.2); and (4) the amount of a corporate guarantee associated with the contract (id. Att. A, app. 2, at § 2).

B. Position of the Companies

According to the Companies, disclosure of the fee and related terms would be commercially harmful to El Paso because other customers and potential customers could use such information to seek similar terms (Request Att. 1, at 3). Moreover, the Companies assert that El Paso's competitors would gain important, competitively sensitive information regarding El Paso's willingness to pay a certain fee or contract charges, thereby providing such competitors with an unfair advantage (id. Att. 1, at 3-4). Finally, the Companies argue that disclosure may: (a) dissuade wholesale marketers from offering these services in Massachusetts in the future in order to protect their positions in national markets and (b) discourage potential portfolio managers from making concessions or agreeing to specific provisions more favorable because public knowledge of such information would decrease the manager's leverage in other negotiations (id. Att. 1, at 4).

C. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that

the [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D exempts the Department, in certain narrowly defined circumstances, from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the statutory presumption that all such information is public information by proving the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need. G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer."); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing). All parties are reminded that requests for protective treatment have not been and will not be automatically granted by the Department. A party's willingness to enter into a nondisclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Edison Company, D.T.E. 97-95, Interlocutory Order on: (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

D. Analysis and Findings

As provided above, our standard of review requires that a proponent of protective treatment prove that the information for which protection is sought constitutes "trade secrets, confidential, competitively sensitive or other proprietary information." G.L. c. 25, § 5D. We conclude that the proponent has proven the need for protection and has overcome the statutory presumption favoring public disclosure. In short, we find that protective treatment of such competitively sensitive information is appropriate because disclosure may affect future negotiations by either constraining the willingness of managers to offer better or more innovative terms, or limit the bargaining ability of the Companies. However, because the changes in the business environment quickly diminish the value of today's competitively sensitive information and tip § 5D's scales in favor of later disclosure, we will protect the information only for a one-year period. At that time, the Companies may renew their request for confidential treatment if they believe it is still appropriate and can show it is supportable.

VI. ORDER

Accordingly, after due notice and consideration, it is hereby

ORDERED: That the Gas Resource Portfolio Management and Gas Sales Agreement Between Boston Gas Company, Colonial Gas Company, and Essex Gas Company as seller and El Paso Energy Marketing Company as buyer be, and hereby is approved in accordance with the terms of this Order; and it is

FURTHER ORDERED: That Boston Gas Company, Colonial Gas Company, and Essex Gas Company shall comply with all the directives contained herein.

By Order of the Department,

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

1. Dispute has arisen over the requirements for this initial filing. The dispute is occasioned by a misreading of the February 1, 1999 Order. That Order required (a) that the RFP be filed with the Department as or shortly after release to bidders, and (b) that the results of the bidding and the agreement with the successful bidder be filed with the Department for both its review and its approval as a regulatory condition precedent to the agreement's effectiveness. No prior Department approval was required for the first filing.

2. City-gate is the point of connection of the interstate pipeline and the natural gas local distribution company's ("LDC") distribution system, where physical possession of the gas commodity is transferred to the LDC by the pipeline. As gas flows generally from producer to end-user, the city gate is the demarcation point between "upstream" (i.e.,

interstate pipeline) capacity and "downstream" (i.e., LDC distribution system, including liquified natural gas and propane peaking) capacity.

3. We note that in addition to this matter, The Berkshire Gas Company is seeking approval of a similar contract for the management of natural gas supply, storage and transportation assets. That matter has been docketed as D.T.E. 99-81.

4. The Request includes the following attachments: Motion of the Companies for Protective Treatment of Confidential Information contained in the Agreement ("Motion"); Explanatory Statement for the Portfolio-Management Proposal; redacted copy of the Agreement; copy of the RFP with all attachments; copy of Companies' responses to potential bidder's questions on the RFP; and redacted economic analysis of El Paso's portfolio management payment versus the Companies' historic revenues from capacity release and other mitigation efforts. This Order addresses the Companies' Motion infra at section V.

5. On October 6, 1999, the Division of Energy Resources ("DOER") filed a letter in support of the Attorney General's and AllEnergy's comments.

6. The Department hereby admits into evidence the following exhibits: the Companies' responses to the Department's information requests DTE-1-1 to DTE-1-17, DTE-2-1 to DTE-2-17, and DTE-3-1 to DTE-3-6; the Companies' responses to the Attorney General's information requests AG-1-1 to AG-1-9, AG-2-1 to AG-2-6, and AG-3-1 to AG-3-8; and El Paso's responses to the Department's information requests DTE-EP-1-1 to DTE-EP-1-7.

7. This pricing hierarchy reflects the manner in which the Companies have traditionally utilized their gas supply resources to meet system requirements. Thus, the commodity prices experienced by the customers during the term of the Agreement will be dictated by the same indices that would have determined prices in the absence of the portfolio-management arrangement (Request Att. 2, at 10-11).

8. See footnote 7, supra.

9. We grant the Companies' request for protective treatment of the maximum limit of the guaranty, infra, at section V.D. We have reviewed the materials and hereby deem the limit sufficient to secure the obligations of El Paso to the Companies.

10. The "fee" refers to the price to be paid by El Paso for utilizing the Companies' upstream assets.

11. AllEnergy offers no definition of "market power" in the present context. The question of market power was raised in the Collaborative meeting of February 17, 1999 (see Response to Information Request DTE 2-3, overhead slide entitled "Order DTE 98-32-B, Capacity Assignment/Cost Responsibility"). There appears to be no clear record evidence that the question arose again until receipt of AllEnergy's comments.

12. The Attorney General terms his Comments "preliminary" because the Companies had not yet fully responded to all discovery requests. The Attorney General, accordingly, purports to reserve the "right" to submit additional comment after a detailed review of the entire filing (Attorney General Preliminary Comments at 1).

13. Eastern-Colonial Acquisition, D.T.E. 98-128 (1999) and Eastern-Essex Acquisition, D.T.E. 98-27 (1998).

14. G.L. c. 164, § 94A provides in pertinent part:

No gas . . . company shall . . . enter into a contract for the purchase of gas . . . covering a period in excess of one year without the approval of the [D]epartment. . . . Any contract covering a period in excess of one year subject to approval as aforesaid, and which is not so approved . . . shall be null and void.

15. The Department notes that during the first year of the Agreement, by operation of the margin sharing formula established in D.P.U. 93-141-A, the Companies will retain 25 percent of the amount in excess of the applicable mitigation revenue threshold of $9,429,706 (Exh. DTE 1-2). Thereafter, the revenues associated with the management fee received from El Paso will not change the margin-sharing threshold for years two or three because they are paid to the Companies in 36 equal monthly installments. Therefore, the remaining management fee revenues will be credited to the Companies' firm sales customers through their respective CGAC filings and the Companies will not retain any additional management fee revenues in years two and three.